impossible for me to say that there is any indication that it is more likely to be true than the claim.

Adopting the view of the law set out above I consider that no grounds have been made out for calling on the plaintiffs to put up security for the costs of the defendants and I therefore dismiss the application. Costs of the application will be costs in the cause.

Application dismissed.

[APPELLATE CIVIL JURISDICTION]

LAVILLE, J.

December 14, 1939.

TEO TONG v. TAN SAI HOON.

[JOHORE BAHRU ORIGINATING MOTION No. 1 of 1939]

Practice—Pauper Appeals—Enlargement of time—F.M.S. Civil Procedure Code, Chapter XLVI.

A litigant who desires to appeal in **forma pauperis** to the Court of Appeal after the time for appeal has expired must—before applying for an enlargement of time—satisfy the Registrar of the Court of Appeal both as to his pauperism and as to the merits of his intended appeal, and for such purpose must attach to his application for leave to appeal as a pauper a memorandum of appeal, as if the application were made under Chapter XLVI of the F.M.S. Civil Procedure Code.

Case referred to:—

(1) *In re Brook David deceased,* 6 M.L.J. 231.

MOTION before a single Judge of the Court of Appeal.

The facts and the points of procedure in question appear from the judgment below.

Applicant in person.

Chia for Respondent.

Laville, J.—The circumstances leading up to this application are as follows:—

In Kluang Civil Suit No. 1 of 1937 the present applicant was defendant: his case was set out by counsel, Mr. Mitter and judgment was entered against him in October, 1937.

Against this judgment he entered notice of appeal after seeking advice of counsel, Mr. Fung on 25th October, 1937, but before the appeal was heard on advice of his counsel, Mr. Fung who also acted for him in the appeal instituted certain proceedings by Originating Summons No. 105 of 1937. The appeal was dismissed without trial, the present applicant withdrawing it by signed notice to that effect and Mr. Fung notifying the Court and the proceedings in Originating Summons No. 105 of 1937 were also dropped and the summons dismissed on 30.4.38.

In spite of withdrawing his appeal and O.S. present applicant appears to have been dissatisfied with the judgment of the Court in C.S. Kluang No. 1 of 1937 and after petitions to the Judge, Johore who rejected his petition after enquiry and petitions to the Chief Justice, Straits Settlements which were referred to this Court he applied to be allowed to appeal in *forma pauperis* against the decision in Kluang Civil Suit No. 1 of 1937.

By Section 32 Courts Enactment the provisions of the Civil Procedure Code relating to appeals by paupers apply, as nearly as possible, to appeals by paupers to the Court of Appeal. This provision by virtue of Chapter XLVI of the Civil Procedure Code appears to nullify the effect of Section 529 (1) of the Civil Procedure Code which states that the provisions of Chapter XLV of that Code do not affect the procedure in appeals from the Court of a Judge to the Court of Appeal.

Under the combined provisions of Sections 569 and 532 Civil Procedure Code as applied to the Court of Appeal by virtue of Section 32 Courts Enactment a pauper desirous of appealing must file with his application to appeal *in forma pauperis* a memorandum of appeal, complying with the provisions of Chapter XLV of the Civil Procedure Code. The Court of Appeal will then examine the application and applicant through the Registrar to whom by Order 1 Rule 40 (1) (g) their authority is delegated, on the *prima facie* merits and pauperism as made necessary by Section 596 read with Sections 436 to 438 of the Civil Procedure Code, and if necessary will send it for opinion of counsel under Section 34 Advocates and Solicitors Enactment and, according as he finds, the Registrar will give leave to bring an appeal *in forma pauperis* or not.

In my view this order merely removes from the appellant his disability of poverty and enables him to prosecute the matter without fees. His right to appeal has never been lost. There remains for him, if he is in time, to lodge notice of appeal, and then proceed as laid down in the rule, governing appeals to the Court of Appeal. If he is out of time, it is open to him to move the Court, before he lodges notice of appeal, to enlarge the time for doing so.

In deciding whether it will do so the Court of Appeal will enquire into the reasons for delay in failing to appeal before and may take into consideration the *prima facie* merits of the grounds of appeal. It has been held in *In re Brooke David deceased,*[1] that such an application requires no affidavit of merits, and clearly, if the above procedure has been followed, the Court knows that the *prima facie* merits have been considered and that what remains is the question of the reasons for delay.

In the case under consideration no memorandum of appeal was filed with application to bring an appeal *in forma pauperis* and there is nothing to show that the *prima facie* merits of the grounds of appeal were considered. Applicant was found to be a pauper but was not given leave to appeal as such but was given leave to apply for enlargement of time as a pauper. I am of opinion that this order was incorrect and that the proper order, if the evidence warranted it would have been for leave to appeal *in forma pauperis* leaving it to him to take the necessary steps of which this was one to lodge his appeal.

As there is nothing to show that the *prima facie* merits have been previously considered it is for this Court, as far as it can from the record to consider them and the reasons for delay in filing this application for enlargement of time for leave to appeal.

On both grounds applicant fails to show sufficient ground. As to the merits he says he is not satisfied on many grounds, but does not name them and goes on to say that his counsel Mr. Fung has not prosecuted his appeal. No explanation is given as to why after 30th. April, 1938 he waited till 7th. November, 1939 to move the Court for leave to appeal out of time. The Court has examined the files of the original case and read the judgment of Mills J. therein and also examined the original notice of appeal and the O.S. 105/37, and the petitions of applicant. These disclose no grounds for giving leave to appeal. Applicant had the advantage of counsel in the lower Court and on the issue of the notice of appeal and the withdrawing of same and the proceedings in O.S. 105/37 and it must be assumed that the ground for the withdrawal of the appeal was for lack of merits. There is no evidence at all of any reason for delay in applying to appeal *in forma pauperis* and it is difficult to believe that applicant who had 3 times engaged counsel was too ignorant to make enquiries at the Court. If there is evidence not available at the trial applicant should apply for revision. I therefore dismiss the motion to enlarge the time for bringing the appeal.

Application dismissed.

[ORIGINAL CIVIL JURISDICTION]

LAVILLE, J.

January 3, 1940.

KATIJAH BINTI ABDULLAH

vs.

LEE LEONG TOH & ANOTHER.

[JOHORE BAHRU CIVIL SUIT No. 7 of 1939]

Negligence—Road Accident—Motor Vehicles in collision—Defence of contributory negligence.

The plaintiff who was a passenger in a motor bus sustained an injury to her right arm in a collision between the bus and another vehicle. At the time of the collision her elbow was resting on a window frame and projecting through the open window. The defendant who was sued as the employer of the driver of the other vehicle denied negligence and set up, as a further ground of defence, contributory negligence on the part of the plaintiff.

Held, that a passenger who owes no duty to the driver of an oncoming vehicle, and who is seated in a normal manner and not infringing any prohibition or disregarding any warning, cannot be guilty of contributory negligence.

Simon v. The London General Omnibus Coy.[2] distinguished.

Cases referred to:—

(1) *Hare v. The London General Omnibus Co.*, 23 L.T.R. 616.

(2) *Simon v. The London General Omnibus Co.*, (1907) 23 T.L.R. 463.

TRIAL OF ACTION.

The relevant facts and arguments appear from the parts of the Judgment set out below.

Mark Morrison for plaintiff.

Hatchard for defendants.

Cur. Adv. Vult.

Laville, J.—The plaintiff Katijah binti Abdullah claims $5,000/- general damages from Lee Leong Toh and Ng Nai Jin owners of a motor lorry No. S. 2731, for injuries to her right forearm and elbow which led to the amputation of the arm above the elbow and which were caused by the negligent driving of defendants' driver one Tan Thong on 9th. December, 1938 at or about the 49½th. mile Johore Bahru—Ayer Itam Road about 4 p.m. in that he caused his lorry S. 2731 to collide with a motor bus M. 161 in the rear right seat of which plaintiff was sitting with her right elbow and forearm resting upon the window frame thereof and the impact of some part of defendants' lorry on her arm and elbow caused the above injuries.